STATE OF MICHIGAN

COURT OF APPEALS

J. EDWARD KLOIAN,

Plaintiff/Counterdefendant-Appellant,

v

THOMAS VAN FOSSEN, Personal Representative of the Estate of WILLIAM VAN FOSSEN,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

VICTOR T. WEBER,

Third-Party Defendant.

UNPUBLISHED
March 29, 2007

No. 262953
Washtenaw Circuit Court
LC No. 84-028688-CK

J. EDWARD KLOIAN,

Plaintiff/Counterdefendant-Appellee,

v

THOMAS VAN FOSSEN, Personal Representative of the Estate of WILLIAM VAN FOSSEN,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

VICTOR T. WEBER,

Third-Party Defendant-Appellant.

No. 262954
Washtenaw Circuit Court
LC No. 84-028688-CK

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

In this consolidated appeal, Edward Kloian, plaintiff-counterdefendant in Docket No. 262953, appeals by right the trial court's final order. Victor Weber, third-party defendant in Docket No. 262954, appeals from the same order. This case arises out of an almost 30 year dispute over rights in commercial real estate located at 400-416 W. Huron Street in Ann Arbor, Michigan (the Property). We affirm on all of Kloian's claims of error but reverse and remand for further proceedings on the claim of Victor T. Weber.

I. Basic Facts And Procedural History

In 1978, Kloian leased the Property to William Van Fossen.[1] At the same time, Kloian granted Van Fossen an option to purchase the Property. A dispute later arose between the parties over nonpayment of rent, alleged breaches of the lease agreement, and whether an option was effectively terminated or exercised. In 1984, Kloian sued Van Fossen for unpaid rent. Kloian then filed an amended complaint, seeking a declaration that he terminated the option. Van Fossen filed several counterclaims, including a request for specific performance of the option to purchase the Property.

In 1991, the circuit court held that Van Fossen was entitled to specific performance. In 1995, the circuit court ordered that the parties enter into a land contract for the sale of the Property to Van Fossen. In 2005, the circuit court entered final judgment in Van Fossen's favor. After a setoff to Kloian for a balloon payment owed pursuant to the terms of the parties' land contract, the circuit court entered a $1,678,415.65 judgment in Van Fossen's favor. The circuit court further held that the parties had satisfied "all obligations under the Land Contract" and transferred the Property to Van Fossen, "free and clear."

II. Clean Hands Doctrine

A. Standard Of Review

Kloian argues that the circuit court should have denied Van Fossen equitable relief under the clean hands doctrine. Kloian did not raise this issue below. However, because the doctrine is designed to preserve the integrity of the judiciary, a party need not raise the clean hands doctrine.[2] We review de novo equity actions.[3]

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[1] William Van Fossen died during the pendency of this case, and the court permitted substitution by his personal representative Thomas Van Fossen. Because this substitution had no relevant procedural effect for the purposes of this case, we will refer to both William Van Fossen and his personal representative as "Van Fossen" throughout this opinion.

[2] *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975).

[3] *Id*. at 383.

B. Absence Of Misconduct

A party seeking the aid of equity must come in with clean hands.[4] "'[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.'"[5] "'The misconduct which will move a court of equity to deny relief must bear a more or less direct relation to the transaction concerning which complaint is made. Relief is not denied merely because of the general morals, character or conduct of the party seeking relief.'"[6] "'Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause'" to invoke the clean hands doctrine.[7]

In this almost thirty-year dispute, neither party has been overly cooperative in attempting to resolve the action. However, we can point to nothing specific that should invoke the clean hands doctrine and preclude Van Fossen from any equitable recovery. Accordingly, we conclude that there is no merit to Kloian's attempt to invoke the clean hands doctrine against Van Fossen.

III. Specific Performance

A. Standard Of Review

Kloian argues that the circuit court abused its equitable powers by imposing completely new terms to the parties' original option to purchase agreement and, therefore, erred in granting Van Fossen specific performance. We review de novo a trial court's ultimate determination in a suit for specific performance.[8] We review for clear error the findings of fact supporting that determination.[9]

B. Relevant Facts

The circuit court concluded that Kloian's course of dealing, statements, and conduct waived his right to require strict compliance with the lease or the option. Thus, he had no grounds to attempt to terminate the lease in July 1983. The circuit court further held that the terms regarding exercise of the option were ambiguous and construed against Kloian. Similarly,

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[4] *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002).

[5] *Stachnik*, *supra* at 382, quoting *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1944).

[6] *McFerren*, *supra* at 524, quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942).

[7] *Stachnik*, *supra* at 386, quoting *Precision Instrument Mfg*, *supra* at 815.

[8] *Samuel D Begola Services v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

[9] *Id.*

the declaration in the lease extension that "Paragraph 47 is null and void" was ambiguous and construed against Kloian. Moreover, the circuit court that found the modified option was void for lack of consideration. Based on the foregoing, the circuit court concluded that Van Fossen proved his claim for specific performance by a preponderance of the evidence. Accordingly, the circuit court held that Van Fossen was entitled to specific performance of the original option terms.

C. Reformation Of Contract

The general rule is that a court in equity has the power to reform a contract to make it conform to the agreement actually made but not to make a new contract for the parties.[10] However,

> Michigan courts have long recognized that a trial court in equity has the power to protect all of the equities of the parties. The court, in equity, may grant complete relief to a party in the form of specific performance, including an award of damages. In granting specific performance, a trial court may award in its decree such additional or incidental relief as is necessary to adequately sort out the equities of the parties. A trial court should enforce the equities of the parties in such a manner as to put them as nearly as possible in the position that they would have occupied had the conveyance of the real property occurred when required by the contract.[11]

Here, the parties' 1978 option to purchase agreement set forth a $375,000 purchase price, which required $75,000 down at closing, less a $10,000 deposit paid at the time of the agreement, and the remaining $300,000 to be paid over a five-year term with ten percent interest. Although the parties voided paragraph 47 of the rider,[12] contrary to Kloian's assertions, we do not interpret this as evidencing intent to void the option to purchase—it simply voided the understanding that the lease and option were mutually dependant.

Further, even assuming that the lease was voided by Van Fossen's failure to properly give formal notice of his intent to exercise the option or by improperly assigning the lease, the record demonstrates that despite these transgressions Kloian remained willing to allow Van Fossen to purchase the Property. Notably, in June 1984, Kloian offered to sell the Property to Van Fossen for $375,000 cash on condition that Van Fossen brought current all his accounts. Further, the circuit court concluded that Kloian's course of dealing, statements, and conduct

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[10] *ER Brenner Co v Brooker Engineering Co*, 301 Mich 719, 723; 4 NW2d 71 (1942).

[11] *Godwin v Lindbert*, 101 Mich App 754, 757-758; 300 NW2d 514 (1980) (citations omitted).

[12] Paragraph 47 of a rider executed with the lease agreement provided as follows:

> Contemporaneously with this lease is a separate written option to purchase the leased premises and both parties agree that this lease and the option are mutually dependent on each other and that neither agreement is binding without the other.

waived his right to require strict compliance with the lease or option. Based on this conclusion, the circuit court held that Van Fossen was entitled to specific performance of the original $375,000 option terms. Thus, we conclude that the circuit court properly exercised its equitable powers to enforce the parties' agreement "in such a manner as to put them as nearly as possible in the position that they would have occupied had the conveyance of the real property occurred when required by the contract."[13] Further, although the circuit court later modified various terms of the parties' agreement, such modifications were done simply in an effort to "sort out the equities of the parties."[14] Accordingly, we conclude that the circuit court did not err in granting specific performance in this case.

IV. Collateral Estoppel

A. Standard Of Review

Kloian argues that the circuit court erred concluding that he was collaterally estopped from denying that he caused the burning of 400 W. Huron. We review de novo the applicability of collateral estoppel.[15]

B. Relevant Facts

On December 31, 1978, 400 W. Huron St. was destroyed by fire. In December 1980, Kloian was indicted in the United States District Court for the Eastern District of Michigan on eight counts of mail fraud.[16] The charges were based on Kloian's attempt to defraud the insurance company that insured 400 W. Huron by filing a claim for the fire and then sending it a letter containing an adjuster's report "for the purpose of executing and concealing" his fraud scheme. A jury convicted Kloian on all eight counts in May 1981.

Reasoning that collateral estoppel barred relitigation in a civil proceedings of an issue decided in a criminal case that was essential to a finding of the defendant's guilt, the circuit court concluded that "it was proven in Federal Court" that Kloian caused the building at 400 W. Huron St. to be burned. The court further held that, without access to the fire insurance proceeds, the cost of the fire damage combined with the loss of rental income, caused an economic hardship on Van Fossen. It was this hardship that caused Van Fossen to enter the modified option agreement, for which Kloian paid Van Fossen $25,000 consideration. The circuit court concluded that Kloian breached the lease when he caused the fire at 400 W. Huron St., breaking Van Fossen's right to quiet enjoyment and excusing Van Fossen's noncompliance with the lease payment provisions.

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[13] *Godwin*, *supra* at 758.

[14] *Id*.

[15] *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

[16] 18 USC 1341.

C. Relevant Legal Provisions

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined."[17] Application of the collateral estoppel doctrine is generally inappropriate when the purposes of the two proceedings are fundamentally different,[18] but crossover estoppel may still occur between civil and criminal proceedings.[19] To be "actually litigated," the issue must have been submitted to and determined by the trier of fact.[20] To be "necessarily determined," the issue must have been essential to the final judgment in the first action.[21] Findings of fact on which the judgment did not depend cannot support collateral estoppel.[22] Collateral estoppel applies only when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained.[23]

For collateral estoppel to apply, the requirement of "mutuality of estoppel" must also usually be satisfied.[24] Mutuality of estoppel requires that

> the parties in the second action must be the same as, or in privity to, the parties in the first action. A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase.[25]

However, there are exceptions to the mutuality requirement, including the defensive use of estoppel against a party who has already had a full and fair opportunity to litigate the issue.[26]

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[17] *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990).

[18] *People v Johnson*, 191 Mich App 222, 225; 477 NW2d 426 (1991).

[19] *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999).

[20] *Van Deventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).

[21] *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

[22] *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).

[23] *Gates*, *supra* at 158; *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001).

[24] *Monat v State Farm Ins Co*, 469 Mich 679, 683-684; 677 NW2d 843 (2004).

[25] *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999) (citations omitted); see *Monat*, *supra* at 684.

[26] *Monat*, *supra* at 680-681, 691, 694-695; see *Knoblauch v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987) (holding that "where a full and fair determination has been made in a previous criminal action that the client received the effective assistance of counsel, the defendant-attorney in a subsequent civil malpractice action brought by the same client may defensively assert collateral estoppel as a bar.").

In applying collateral estoppel, courts must strike a balance between the right of the litigant against whom the right is asserted to have his or her day in court, and the need to prevent overburdening our courts with repetitious litigation.[27]

D. Applying The Law

Although mutuality of estoppel is lacking in this case because Van Fossen was not a party to the federal criminal prosecution, we conclude that requirement need not be met because Van Fossen is asserting collateral estoppel defensively against a party who has already had a full and fair opportunity to litigate the issue. As evidenced by the indictment and his subsequent conviction, Kloian's involvement in causing the burning of 400 W. Huron was actually litigated and necessarily determined. Count I of the indictment was based, in pertinent part, on the claims that "KLOIAN asked MELVIN PERSKY to retain the services of Thomas Elrod to set fire to and burn down the premises . . . ." and that "KLOIAN met with MELVIN PERSKY . . . and delivered $2,500.00 to MELVIN PERSKY in payment for the burning of the premises . . . ." The circuit court's determination that collateral estoppel barred relitigation of this issue in this overly protracted action was a prudent decision to effectuate the efficient administration of justice. Accordingly, we conclude that the circuit court did not err in ruling that Kloian was collaterally estopped from denying that he caused the burning of 400 W. Huron.

V. The Release

A. Standard Of Review

Kloian argues that the circuit court erred in finding that a October 1981 release was not supported by consideration. We review de novo the interpretation of a release.[28]

B. Relevant Facts

In October 1981, Kloian and Van Fossen executed a release by which Van Fossen released Kloian from "all claims he might have of whatsoever nature arising out of and by virtue of" the 400 W. Huron St. fire. The stated consideration for the agreement was Van Fossen's receipt of "a substantial portion of the proceeds received by J. Edward Kloian from the insurance carrier insuring the premises against said fire loss [that] were given by J. Edward Kloian to . . . William L. Van Fossen for improvements made to said premises[.]" The circuit court concluded that this purported release of claims was not supported by consideration.

C. Consideration

A release must be supported by consideration, which requires (1) a legal detriment, (2) which induces a promise to release another from liability, and (3) that the promise to release

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[27] *Howell v Vito's Trucking Co*, 386 Mich 37, 48; 191 NW2d 313 (1971).

[28] *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

induced the legal detriment.[29] "There is no enforceable contract where there is a failure of consideration."[30] And "doing what one is legally bound to do is not consideration for a new promise."[31] Here, the circuit court properly concluded that the release was not supported by consideration. Van Fossen received the purported consideration (insurance funds) approximately 18 months before the release was executed; thus, the payment of the funds could not constitute a legal detriment that induced a promise to release. Kloian suffered no legal detriment by agreeing to pay the proceeds that had already been paid. Further, pursuant to the lease rider, Van Fossen was previously entitled to those funds. Accordingly, we conclude that the circuit court did not err in concluding that the release was not supported by consideration and, therefore, invalid.

VI. Attorney Fees

A. Standard Of Review

The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court.[32] An exercise of the court's inherent power to impose sanctions may be disturbed only upon a finding that there has been a clear abuse of discretion.[33] We review a trial court's determination regarding the amount of attorney fees for clear error.[34]

B. Relevant Facts

The circuit court determined that Van Fossen was entitled to an award of attorney fees as exemplary damages. To support the award, the circuit court relied on Kloian's involvement with the 400 W. Huron fire, his failure to pay insurance proceeds, and his refusal to allow Van Fossen to purchase the Property on land contract. According to the circuit court, Van Fossen lost rental income and was forced to litigate the case because of Kloian's illegal conduct. Therefore, the court concluded, it was proper to award Van Fossen exemplary damages to give him "a more complete equitable remedy." Accordingly, in its final judgment, the circuit court granted Van Fossen $2,173,361.97 in attorney fees as exemplary damages "on the basis of illegal actions or conduct by an opposing party."

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[29] *Paterek v 6600, Ltd*, 186 Mich App 445, 451; 465 NW2d 342 (1990).

[30] *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

[31] *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000).

[32] *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, ___; ___ NW2d ___ (2006).

[33] *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999).

[34] *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002).

C. Attorney Fees As Damages

Kloian argues that the circuit court abused its discretion in awarding Van Fossen attorney fees as exemplary damages. We do not agree with the circuit court's characterization of its award as being "exemplary damages" because such "damages are a class of compensatory damages that allow for compensation for injury to feelings."[35] However, a court, in equity, may grant an award of damages.[36] And, while attorney fees may generally not be awarded unless authorized by statute or court rule, an exception exists where a party is seeking to recover attorney fees as damages for having been forced to expend money by the unlawful conduct of the other party.[37] "[A] trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney."[38]

Here, to support the award its award of attorney fees as exemplary damages, the circuit court relied on Kloian's involvement with the 400 W. Huron fire, his failure to pay insurance proceeds, and his refusal to allow Van Fossen to purchase the Property on land contract. According to the circuit court, Van Fossen lost rental income and was forced to litigate the case because of Kloian's illegal conduct. The circuit court concluded that it was proper to award Van Fossen attorney fees to give him "a more complete equitable remedy." We find no abuse of discretion in this decision. Accordingly, we conclude that the circuit court did not abuse its discretion in awarding Van Fossen attorney fees on the basis of Kloian's unlawful conduct.[39]

D. Amount Of Attorney Fees

Kloian also argues that the circuit court erred in its determination of the amount of attorney fees. We disagree. The factors for determining reasonable attorney fees include: "(1) the professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship with the client."[40] Aside from simply claiming that the evidence was insufficient to support the circuit court's award, Kloian offers no specific argument nor does he point to any specific errors in the court's calculations to support this argument. In contrast, the circuit court record demonstrates that Van Fossen submitted extensive evidence in support of his attorney fees, including the fees and expenses paid, as well as the interest accruing on those fees, and the court took testimony

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[35] *McPeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999).

[36] *Godwin*, *supra* at 758.

[37] *Spectrum Health v Grahl*, 270 Mich App 248, 258; 715 NW2d 357 (2006); *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991).

[38] *Persichini*, *supra* at 639.

[39] We will not reverse the lower court when the court reaches the correct result albeit for the wrong reason. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005).

[40] *Persichini v William Beaumont Hosp*, 238 Mich App 626, 644; 607 N.W.2d 100 (1999).

from several witnesses pertaining to the above reasonableness factors. Accordingly, we conclude that the circuit court did not clearly err in its factual findings when granting Van Fossen over $2 million in attorney fees as exemplary damages.

VII. Statutory Interest

A. Standard Of Review

We review de novo as award of prejudgment interest under MCL 600.6013.[41] We review for an abuse of discretion a trial court's determination of the appropriate interest rate.[42]

B. Relevant Facts

In August 1993, the circuit court issued its decision on the remaining issues regarding the terms of the sale of the Property, including the purchase price. The circuit court determined the Van Fossen owed Kloian $345,205 to buy the Property, to be paid by November 1, 1993. The circuit court calculated this total by subtracting from the originally-agreed upon purchase price of $375,000 a total of $61,895, which amount included the $15,000 security deposit, the $10,000 option purchase price, $35,000 due to the 400 W. Huron St. fire, and $1,895 for unpaid insurance proceeds, and then adding back $32,100 for past due rent and taxes. The circuit court then acknowledged that Kloian must be compensated for Van Fossen's use of the property and Kloian's resultant loss of use. Accordingly, the circuit court concluded that Van Fossen must pay Kloian either compounded interest from November 1, 1983, to the date of closing or the net proceeds from rental of the Property.

The circuit court then explained that, in the event that interest was paid, the rate would be set at the lesser of ten percent, in accordance with the contract, for five years, or the statutory rate under MCL 600.645. After five years, the interest would be set according to the statute. The circuit court noted that MCL 600.645 was not applicable to the facts at hand but explained that its provisions were an "equitable way to determine the interest." The circuit court ordered that at closing, on or before November 1, 1993, the parties enter a one-year land contract in accordance with the original option, with interest set at the lesser of ten percent or the statutory rate. The circuit court stated that the payment of any sum to Kloian or into escrow would stop the accrual of interest, but that Kloian was entitled to any interest earned in escrow. The circuit court noted that Van Fossen had not proven any tender in 1984 that would have cut off interest. The circuit court further concluded that there had been no partial eviction justifying rent abatement. Last, the circuit court concluded that any claims for penalties or interest accruing before November 1, 1983, had been waived. After further litigation, Van Fossen ultimately elected the interest approach, as opposed to the net proceeds approach, to determine the amount owed to Kloian for use of the Property.

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[41] *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 623; 550 NW2d 580 (1996).

[42] See *Lawrence v Lawrence*, 150 Mich App 29, 34; 388 NW2d 291 (1986).

C. Balance Due To Kloian

During the proceedings below, Kloian argued that, under express terms of the land contract, he was entitled to either ten percent interest or, as provided under MCL 600.6013(4), (5), and (6), he was entitled to 12 percent interest because the complaint in this case was filed before January 1, 1987. Van Fossen agreed with application of a 12 percent interest rate. The circuit court held that the all interest due to Kloian under the option be set at a rate of ten percent and, citing MCL 600.6013(4), that "any amounts found to be due and owing not specifically related to the option for the land contract . . . be set at the rate of 12 %, this action having been filed prior to January 1, 1987." The circuit court further ordered that "any amounts previously calculated . . . based on the variable statutory rate . . . be recalculated pursuant to this order." On appeal, Kloian argues that the circuit court erred in not applying the 12 percent statutory interest rate to the balance due Kloian.

MCL 600.6013 governs the award and calculation of interest on money judgments, and entitles a prevailing party in a civil action to prejudgment interest from the date the complaint was filed to the entry of judgment.[43] MCL 600.6013 "serves the purpose of compensating the prevailing party for loss of the use of the funds awarded as a money judgment, as well as offsetting the costs of bringing a court action."[44] Section (1) expressly provides that "[i]nterest shall be allowed on a money judgment recovered in a civil action." And, reading the plain language of the statute, the Michigan Supreme Court has confirmed that interest is recoverable on "the entire judgment," including attorney fees.[45] For actions filed after June 1, 1980, but before January 1, 1987, MCL 600.6013(4) states that "interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually."

As a court acting in equity, we find no error in the circuit court's decision to enforce the terms of the parties' agreement, which specified a rate of ten percent. Further, the balloon payment was not a "money judgment recovered in a civil action," as contemplated by MCL 600.3013(4). The balloon payment was simply the amount that Kloian owed under the terms of the contract after the circuit court granted Van Fossen specific performance. Accordingly, we conclude that the circuit court did not err in not applying the 12 percent statutory interest rate.

D. Escrow Account

Kloian argues that the circuit court erred in ruling that Van Fossen's payments into an escrow account held by his own attorney's law firm stopped the running of interest on those funds.

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[43] *Beach*, *supra* at 624.

[44] *Old Orchard By The Bay Assocs v Hamilton Mut Ins Co*, 434 Mich 244, 252; 454 NW2d 73 (1990).

[45] *Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573, 577, 589; 321 NW2d 653 (1982).

Pending resolution of the case, the circuit court ordered Van Fossen to deposit $3,750 a month into escrow account held by Van Fossen's attorney. In its August 30, 1993 decision, the circuit court ruled that "The payment of any sums to Mr. Kloian or into escrow stops interest on those sums." We find no error in this ruling. The Michigan Supreme Court has held that the tender into court of part of a claimed liability only cuts off the interest as to the amount tendered.[46] Therefore, there is no merit to Kloian's claim that he is entitled to "prejudgment interest . . . on the funds held in escrow until he received them." Accordingly, we conclude that the circuit court did not err in not applying the 12 percent statutory interest rate to the escrow funds.

VIII. The Balloon Payment

Kloian argues that the circuit court erred in finding that Van Fossen owed Kloian only $494,946.32 on the balance of the balloon payment. We disagree. Kloian failed to dispute this issue below; therefore, this issue is not preserved for our review. Moreover, Kloian failed to offer any evidence in support of his proposed calculations. Accordingly, we conclude that the circuit court did not clearly err[47] in relying on Van Fossen's calculations of the balloon payment.

IX. Weber's Appeal

A. Standard Of Review

Weber argues that he has a mortgage interest in the Property that is protected by the due process clauses of both the United States and Michigan Constitutions. Generally, we review for an abuse of discretion a trial court's decision on a motion to intervene.[48] However, the circuit court did not expressly rule on the merits of Weber's motion, rather the circuit court left the issue for this Court to decide. Therefore, we agree with Weber that a de novo review is more appropriate. We review de novo the construction and interpretation of court rules.[49]

B. Relevant Facts

Under the terms of the 1995 Kloian/Van Fossen land contract, Kloian was authorized to execute a mortgage on the Property. Specifically, part (a) of § 3 of the land contract states: "[Kloian] may mortgage the premises as security for [his] debts so long as the mortgage does not adversely affect any of [Van Fossen's] rights under this contract." Accordingly, in January 1997 Kloian and Weber entered into a $200,000 mortgage agreement on the Property. In May 2004, Weber filed a foreclosure action in the United States District Court for the Eastern District of Michigan, alleging that Kloian had defaulted on the mortgage. In October 2004, Kloian quitclaimed to Weber his interest in the Property in lieu of Weber foreclosing on the Property.

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[46] *Kleynenberg v Highlands Realty Corp*, 340 Mich 339, 343; 65 NW2d 769 (1954).

[47] See MCR 2.613(C).

[48] *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

[49] *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

In November 2004, Van Fossen moved to add Weber as a necessary party to the lower court action under MCR 2.205 because Weber's presence was necessary for him to gain clear title to the Property. On November 12, 2004, Weber quitclaimed his interest in the Property back to Kloian with a purported reservation of Weber's rights pursuant to the mortgage agreement. Thereafter, Kloian moved for denial of Van Fossen's motion to add Weber, arguing that he was no longer a necessary party in light of the latter quitclaim deed. Kloian argued that, as simply a mortgagee rather than a property owner, Weber was not an affected party. Nevertheless, the circuit court granted Van Fossen's motion to add Weber as a necessary party.

In December 2004, Van Fossen filed a third-party complaint against Weber, seeking a declaration of Weber's rights in the Property. In his complaint, Van Fossen asserted: "Weber appears to have a legal interest in the Property that must be determined and adjudicated in order for [Van Fossen] to receive clear and marketable title to the Property." However, the circuit court dismissed Weber from the litigation without prejudice on the grounds that its order allowing the third-party complaint was "improvidently granted" and that Weber's interest in the property should be determined in "another filing." Specifically, the circuit court stated:

> The Court is not in a position to issue an equitable ruling regarding the claims of [Van Fossen] against [Weber] with respect to the mortgage on the property due to the circumstances of the litigation. The earlier motion to allow the Third-Party Complaint was improvidently granted. As a result, the Third-Party Complaint is hereby dismissed without prejudice and with right to refile. Any mortgage interest of Third-Party Defendant Victor Weber and any defenses thereto will need to be resolved in another filing.

The circuit court later entered its final judgment, stating, in pertinent part, as follows:

> The Register of Deeds and Recorder's Office is ordered to accept this Judgment Entry as transferring any and all ownership interest of Kloian, his heirs, beneficiaries, mortgagees, lessees, and assignees in the real property . . . to Van Fossen.

In May 2005, Weber filed against Van Fossen a claim of appeal from the circuit court's final judgment.

A few days later, Weber filed a post-judgment motion to intervene in the lower court action under MCR 2.209(A)(3), alleging that the final order negatively impacted his mortgage interest in the Property. After hearing oral arguments on the motion, the circuit court denied the motion, explaining its ruling as follows:

> With regard to the motion to intervene, I'm going to deny that motion. Of course, you can ask the Court of Appeals to intervene in the appeal which is really what you seek here anyway, but I'll leave that to them to determine if they want you in the appeal or not.

Weber then moved to intervene in this Court, which was denied.[50] This Court also later denied Van Fossen's motion to dismiss Weber's appeal for lack of jurisdiction.[51]

C. Standing

Van Fossen argues that this Court lacks jurisdiction for Weber's appeal because Weber is neither a *party* to the underlying action nor *aggrieved* by the circuit court's decision. According to Van Fossen, Weber is not an aggrieved party because the final judgment applies only to mortgagees in real property and Weber is not a mortgagee in real property where Kloian's interest in the property at the time of the mortgage issuing was merely that of a land contract vendor. Van Fossen argues that a land contract vendor's interest in property is a personal property interest. Therefore, Van Fossen asserts, Weber has no interest in the subject matter of the litigation.

Weber responds, arguing that he is an aggrieved party for purposes of establishing jurisdiction. He claims that, although his interest is subservient to Van Fossen's, he nonetheless has an interest in the subject property, which Van Fossen acknowledged needed to be determined when he sought to bring Weber into this action in the third-party suit. Weber also argues that the denial of a request to intervene does not deprive a party of its status as an aggrieved party. Weber argues that the terms of the circuit court's final judgment adversely affected Weber's mortgage. Additionally, Van Fossen's argument that Weber is not a mortgagee in the real property is frivolous because Van Fossen admitted below that Weber owned the mortgage.

This Court "has jurisdiction of an appeal of right filed by an aggrieved party[.]"[52] "A party is aggrieved by a judgment if the party has an interest in the subject matter of the litigation."[53]

> "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *In re Estate of Trankla*, 321 Mich 478, 482; 32 NW2d 715 (1948), citing *In re Estate of Matt Miller*, 274 Mich 190, 194; 264 NW 338 (1936). An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an

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[50] See *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered March 22, 2006 (Docket No. 262954).

[51] See *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered June 12, 2006 (Docket No. 262954).

[52] MCR 7.203(A) (emphasis added).

[53] *Irish v Treasurer of Michigan*, 158 Mich App 337, 344; 404 NW2d 733 (1987).

> injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.[54]

In other words, a party has an interest in the subject matter of the litigation if his or her legal right is invaded by an action, or his or her pecuniary interest is directly or adversely affected by a judgment or order.[55] "[T]he definition of aggrieved party varies according to the type of case at issue and, consequently, the court must in each case examine the subject matter of the litigation."[56]

Although Weber was no longer a "party" to the underlying action at the time of the circuit court's final judgment, he was, for a short period, a third-party defendant brought into the action on Van Fossen's motion. And the denial of Weber's motion to intervene should not deprive him the right to claim the status of an aggrieved party.[57] Further, Weber has an interest in the subject matter of the litigation. Regardless whether he held a real estate mortgage or a land contract mortgage, the final judgment adversely and directly affects the worth of the mortgage he holds. The circuit court's final judgment necessitated that Weber take action to protect his interest.

Although he circumvented proper procedure by not filing his post-judgment motion to intervene in the underlying action until *after* he filed his appeal (Docket No. 262954), it is important to recognize that "[t]he court rules are to be construed so that defects in the proceedings do not affect the substantial rights of the parties[.]"[58] Justice would not be served in this case by employing an overly technical reading of the court rule and determining that Weber cannot contest the denial of his motion to intervene because he was not an official "party" to the action, when the purpose of his motion was to become a "party" to the action.[59] Having determined that this case is properly before us, we now turn to Weber's argument that he should have been permitted to intervene in the underlying matter.

D. Right To Intervene

To establish a right to intervene, an applicant must (1) file a timely, written application, (2) show that the existing parties inadequately represent the applicant's interests, and (3) show

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[54] *Federated Ins Co v Oakland Co Rd. Comm'n*, 475 Mich 286, 291-292; 715 NW2d 846 (2006).

[55] *In re Estate of Critchell*, 361 Mich 432, 448-455; 105 NW2d 417 (1960).

[56] *Security Ins Co of Hartford v Daniels*, 70 Mich App 100, 105; 245 NW2d 418 (1976).

[57] *Marsack v Citizens Ins Co*, unpublished opinion per curiam of the Court of Appeals, decided December 6, 1996 (Docket No. 190356), slip op at 2-3. Although unpublished opinions are not precedentially binding under the rules of stare decisis, MCR 7.215(C)(1), we find this decision persuasive.

[58] MCR 1.105; *SNB Bank & Trust v Kensey*, 145 Mich App 765, 772; 378 NW2d 594 (1985).

[59] See *SNB Bank & Trust*, *supra* at 772-773.

that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect his or her interests.[60] The rule for intervention should be liberally construed.[61]

Although Weber did not move to intervene until after the circuit court issued its final judgment, we conclude that his application was timely because he filed it as soon as he learned of the circuit court's order effecting his mortgage interest. Prior to the order, he had a reasonable belief that his interest was protected.

"[T]he concern of inadequate representation of interests need only exist; inadequacy of representation need not be definitely established. Where this concern exists, the rules of intervention should be construed liberally in favor of intervention."[62] As a mortgagee with an interest in the Property, Weber's interest is obviously adverse to the interest of his mortgagor, Kloian, and to the interest of Kloian's vendee, Van Fossen. Thus, a concern exists regarding inadequate representation of Weber's interest by the existing parties to the action.

Additionally, in his motion to add Weber as a necessary party to the lower court action, Van Fossen asserted that Weber had a mortgage interest in the property. Specifically, Van Fossen alleged as follows:

> On January 6, 1997, [Kloian] executed a mortgage to the M.F. Weber Trust "B" (the "Weber Trust"), a trust of which Victor Weber ("Weber") was the trustee and beneficiary, in the principle amount of $200,000 ("Mortgage"). Said Mortgage was recorded . . . . The Weber Trust was dissolved and the Mortgage and other assets of the Weber Trust were distributed to Weber. Thus, *Weber now owns the Mortgage*.

Inconsistencies discovered in a party's pleadings may be used as substantive evidence to how lack of candor or absence of good faith argument.[63] Van Fossen's third-party complaint serves as an admission that Weber holds an interest in the Property and that he is entitled to adjudication of that interest. Moreover, although Van Fossen asserts that any interest Weber has is subordinate to his, the fact remains that Weber has *an interest* in the litigation. The parties dispute what effect, if any, the final judgment has on Weber's interest. That is, the parties dispute the nature of Weber's interest in the property. Van Fossen argues that Weber was not a mortgagee in real property and was, thus, unaffected by an order that applied only to real property mortgages. Weber argues that he does indeed hold a mortgage interest in the real estate. However, this Court is not the proper forum in which to litigate the exact nature of Weber's interest in the property. That determination should be made by the circuit court. Accordingly, we conclude that Weber did have a right to intervene in the lower court action.

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[60] *Oliver v Dep't of State Police*, 160 Mich App 107, 114-115; 408 NW2d 436 (1987); see MCR 2.209 (A)(3), (B)(2), and (C).

[61] *Neal v Neal*, 219 Mich App 490, 492; 557 NW2d 133 (1996).

[62] *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001).

[63] See *Grand T W R. Co v Lovejoy*, 304 Mich 35, 41; 7 NW2d 212 (1942).

X. Conclusion

There is no merit to Kloian's attempt to invoke the clean hands doctrine against Van Fossen. The circuit court did not err in granting specific performance in this case. The circuit court did not err in ruling that Kloian was collaterally estopped from denying that he caused the burning of 400 W. Huron. The circuit court did not abuse its discretion in awarding Van Fossen attorney fees as exemplary damages. The circuit court did not err in concluding that the release was not supported by consideration and, therefore, invalid. The circuit court did not clearly err in its factual findings when granting Van Fossen over $2 million in attorney fees as exemplary damages. The circuit court did not err in not applying the 12 percent statutory interest rate. The circuit court did not err in not applying the 12 percent statutory interest rate to the escrow funds. The circuit court did not clearly err in relying on Van Fossen's calculations of the balloon payment. The circuit court erred in dismissing Weber from the action without allowing him an opportunity to be heard on the nature of his interest in the litigation.

We affirm on all of Kloian's claims of error but reverse and remand for further proceedings on Weber's appeal. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette